No. 278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Petitioner*,

v.

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR., AND COMPANY, *Respondents*.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Petitioner*,

v.

KING EDWARD TOBACCO COMPANY OF FLORIDA AND MAY TOBACCO COMPANY, *Respondents*.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

MILTON C. DENBO
1625 K Street, N. W.
Washington 6, D. C.
Attorney for Respondents

Of Counsel:

POOLE, SHROYER & DENBO
1625 K Street, N. W.
Washington 6, D. C.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

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OPINIONS BELOW

The opinion of the District Court (RK 97, RB 212)[1] is reported in 114 F. Supp. 865 and also in 11 WH Cases

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[1] "RK" references are to the record in *King Edward* and *May*; "RB" references are to the record in *Budd*.

643 and 24 Labor Cases ¶67,897.[2] The opinion of the Court of Appeals (Pet., App. A, pp. 33-41) is reported in 221 F. (2d) 406 and also in 12 WH Cases 458 and 27 Labor Cases ¶69,105.

JURISDICTION

The judgments of the Court of Appeals herein (Pet., App. A, pp. 42-43) were entered on April 15, 1955 (RK 175, RB 256). An order, extending until August 1, 1955, the time for filing a petition for a writ of certiorari, was entered by Mr. Justice Black on July 8, 1955 (Pet., App. A, p. 43). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

These cases arise under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. §201) *et seq.*, hereinafter called "the Act". Pertinent provisions of the Act and pertinent administrative regulations involved are set forth in Appendix B to the Petition, pp. 44-48.

QUESTIONS PRESENTED

1. Whether the exemption from the wage and hour provisions of the Act provided by Section 13(a)(6) for "any employee employed in agriculture", as "agriculture" is defined in Section 3(f), applies to the employees of Respondent King Edward, who are engaged at its tobacco packing plant in handling and preparing for market tobacco grown exclusively on its own farms.

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[2] The District Court also wrote a supplemental opinion which is not officially reported (RK130, RB223; 24 Labor Cases ¶68056).

2. Whether the same exemption applies to the employees of Respondent May, who are engaged at its tobacco packing plant in handling and preparing for market tobacco grown exclusively on its own farms.

3. Whether such employees and also the employees of Respondent Budd perform operations enumerated in the exemption from the wage and hour provisions of the Act provided by Section 13(a)(10) for

> "any individual employed within the area of production (as defined by the Administrator),[3] engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products".

4. Whether the Administrator's definition of the term "area of production" pursuant to Section 13(a)(10) of the Act is invalid as applied to the factual situation here presented, insofar as it excludes from the "area of production" Respondents' tobacco packing plants solely because they are located in a town of over 2500 population, to wit, Quincy, Florida, which has a population of approximately 6500.

5. If the Court finds that it is unable on the present Record to hold the exemption of Section 13(a)(6) applicable to the employees of Respondents King Edward and

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[3] Prior to May 24, 1950 the administration of the Act was in the hands of the Administrator of the Wage and Hour and Public Contracts Divisions. But effective on that date, the administration of the Act was transferred to the Secretary of Labor by virtue of Reorganization Plan No. 6 of 1950 (15 Fed. Reg. 3174), 64 Stat. 1263, 5 U.S.C. 133 z-15. The Secretary, however, has delegated back to the Administrator almost all of his functions in the administration of the Act. 15 Fed. Reg. 3290. In view of the foregoing, references are sometimes made in this brief to administration of the Act by the Secretary, who is the Petitioner herein, and at other times to administration by the Administrator.

May, or to hold that such employees as well as the employees of Respondent Budd perform operations enumerated in Section 13(a)(10) and that the "area of production" definition is invalid, whether the Court of Appeals erred in not reversing the summary judgments granted by the District Court against Respondents on the ground that the actions could not appropriately be decided on motions for summary judgment and in not remanding said actions to the District Court with instructions that they be decided only after full and complete trial of the issues.

STATEMENT OF THE CASE

Petitioner's statement of the case (Pet., pp. 3-10) is incomplete or inaccurate in many respects. Accordingly, Respondents submit the following statement:

Notwithstanding both the District Court and the Court of Appeals each wrote only one opinion herein, two separate actions are involved: (1) an action against King Edward and May, and (2) an action against Budd.

All three Respondents contend that the writ prayed should be denied. Respondents King Edward and May wish to point out, however, that as to them the writ prayed should be denied if, as they contend, the Court of Appeals correctly held that their packing plant operations are exempt under the Section 13(a)(6) agriculture exemption in the Act, regardless of whether such operations are also exempt, as the Court of Appeals further held, under the Section 13(a)(10) area of production exemption. Respondents King Edward and May also contend, however, as does Respondent Budd, that the writ prayed should be denied because the Court of Appeals correctly held that their packing plant operations fall within the operations enumerated in Section 13(a)(10), that the Administrator's definition of "area of production" is invalid as applied to such operations, and that until a valid definition

is made excluding their plants from the "area of production", Petitioner is not entitled to an injunction against them. Respondent Budd does not claim that it is entitled to the exemption provided by Section 13(a)(6) and the Court of Appeals did not so hold. Consequently, contrary to Petitioner's statement of the questions (Pet., p. 2), no question is here involved as to the application of the agriculture exemption to Budd's employees.

In view of the foregoing, the facts as to the two actions here will be presented separately.

1. *King Edward and May*

The facts as to May and King Edward are essentially the same. For the sake of brevity and conciseness, we shall set forth the facts as to May and then indicate the differences as to King Edward to the extent that they may be deemed material.

May's business consists of planting, raising and harvesting cigar wrapper leaf tobacco on farms which it owns in Gadsden County, Florida and of curing, warehousing and packing such tobacco at its packing plant in Quincy, Gadsden County, Florida (RK 69-71, 117, 118), a town with a population of some 6500 (RK 18, 170-171).

May's farms have an aggregate acreage of approximately 2800 acres, including woodland, grazing land and general farm land. 423 acres are under cultivation (RK 148,[4] 151) and of these, 90 acres are devoted to the planting, cultivating, growing and harvesting of United States type No. 62 cigar wrapper leaf tobacco (RK 70, 106, 117, 170). This type of tobacco is grown only in three counties in Florida and in two counties in Georgia adjoining two of those in Florida, and nowhere else in the world (RK 97-98, 118, 168).

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[4] RK 148 refers to a "columnar chart" filed by Respondents as an exhibit with the District Court at a pre-trial conference (RK 151).

May's tobacco is grown in fields on its farms under cheesecloth shade, which completely covers and encloses the fields (RK 101, 117, 118, 168-169). The fields are highly fertilized and intensively cultivated during the growing period(RK 101, 169).

In harvesting the tobacco, as each leaf reaches a certain state of maturity, it is promptly picked by May's employees and taken immediately to one of several curing barns located on the farm. There the leaf, in which the water content is at first 80 to 85 per cent, is strung, hung on sticks and dried (its water content being reduced to between 10 and 25 per cent) until it turns into a shade of brown. It is then taken down, packed loosely in boxes and carried to May's single packing plant located not more than ten miles from any of May's farms. This transfer from the curing barn to the packing plant must be prompt in order to avoid any harmful stoppage or acceleration of the intra-cellular changes that are continuously taking place within the leaf (RK 70-71, 101-102, 118, 120-121, 122-123, 148, 151, 169).

When the tobacco arrives at the packing plant, it is piled on the floor in piles or bulks of 3500 to 4500 pounds each for fermentation, and so remains from two to four months.[5] During this period the bulks are taken down

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[5] Fermentation of tobacco is aging the tobacco to make it fit for human use. There are no exceptions to the rule that fermentation must take place before tobacco can be used. See excerpts from the book by W. W. Garner entitled "The Production of Tobacco" at RK 39. Mr. Garner is a noted plant physiologist, employed for 40 years by the United States Department of Agriculture in making scientific tobacco investigations (RK 26-27). The excerpts from his book referred to were attached as an exhibit to an affidavit offered by the Petitioner in opposition to King Edward's first motion for summary judgment, page 11, *infra*. The bulk method of fermentation is described in Mr. Garner's book at RK 43, *et seq.* See also *Circular No. 249, U. S. Department of Agriculture*, 1942, entitled "*American Tobacco Types, Uses and Markets*" p. 124, where it is stated that "Practically all tobacco goes through a process of aging . . . [which] renders it suitable for use".

from time to time and repiled or rebulked for the purpose of aerating the leaf and preventing excess fermentation in the interior of the bulk, and to assure that the natural changes in the leaves will be as uniform as possible throughout the entire bulk (RK 102, 118-119, 169; see also RK 45). After the bulking, the leaves are sprayed in order to keep them soft and pliable enough for handling without breakage or injury (RK 119, 124). Following this operation the leaves are sorted and graded and then rebulked in order to dry for a further period of from two to four months. The leaves are then baled for sale and shipment to cigar manufacturers (RK 102, 119, 170).

As held by the Court of Appeals below (RK 171-172, 170; see also RK 60), the operations of bulking, sorting and baling the tobacco at the packing plant are customary and necessary operations to prepare the tobacco for market.[6] On the other hand, none of the tobacco is stemmed, cut or treated, and none is processed other than as previously described (RK 120). There is nothing in the Record to support Petitioner's assertion (Pet., pp. 4-5, 6) that May's packing plant operations require extensive or valuable industrial equipment, and the District Court in effect found otherwise (RK 132). Also, contrary to the impression Petitioner seeks to give (Pet., pp. 6-7), the operations are not mechanized and are performed by unskilled farm laborers. *Infra*, p. 9.[7]

The entire process of the treatment of the leaf, from the time it is first hung in the curing barn on the farm until bulk sweating in the packing plant is completed, is one continuous process of natural (see RK 170) transfor-

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[6] See *Circular No. 249, U. S. Department of Agriculture*, p. 85.

[7] May's sales of tobacco from its packing plant have averaged between $300,000 and $350,000 per year for the past several years (RK 72, 125). The total 1952 tobacco crop harvested at its farms and handled at its plant was approximately 112,000 pounds green weight (*Id.*)

mation within the leaf, necessary to assure the desired color and appearance of the leaf, and is completed without adding any external catalyst or other chemical element or artificial stimulation. Only the temperature is regulated both at the barn and in the packing plant,[8] in order to prevent injurious acceleration or stoppage of the gradual and continuous natural internal transformation of the leaf. Such transformation is a process of drying and oxidation, accompanied by chemical changes within the leaf (RK 121-122).[9] The chemical changes commence at the curing barn and continue throughout the bulk sweating at the packing plant. There is no dividing point between those which occur at the two places (RK 123-124; see also RK 40, 49).[10] It is incorrect, therefore, for Petitioner to assert (Pet., p. 4) that May's curing barn operation is essentially a "drying" operation, while the packing house operation is a "fermentation" operation. In fact both are "drying" and "fermentation" operations and, as noted, together constitute one continuous process. The only reasons for moving the tobacco to the packing house from the barns are that there are insufficient barns on the farms to store the tobacco until bulking is completed, and the natural transformation within the leaf takes longer in the barns than in the bulking operations performed in the packing plant (RK 122; see also RK 40).

May employs approximately 70 employees in its packing plant at the height of the packing season and such em-

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[8] Atmospheric temperature is controlled to some extent in the barn, and the temperature of the bulks at the packing plant is controlled by taking down and rebuilding the bulks as previously described in the text (RK 121).

[9] See also the Garner book at RK 31, 32-33, 34, 36, 38, 46-47, 48-52 which discuss such changes and their causes.

[10] See further *Circular No. 249, U. S. Department of Agriculture*, p. 124, which states that "The chemical changes [effected by the fermentation] represent an extension of the curing process."

ployees are engaged in bulking, sorting, handling and baling of tobacco and shipping same to market (RK 69-70, 119-120, 171). All such tobacco is tobacco grown by May on its farms, as May does not handle tobacco grown by others (RK 70-71, 118, 125) and the District Court so found (RK 106) as did the Court of Appeals (RK 170). Approximately 90 per cent of the employees who work in the packing plant reside either on May's farms or adjoining farm lands in Gadsden County, Florida (RK 71-72, 120, 148, 151). Many of such employees work on May's farms in planting, growing, harvesting and barn curing the tobacco and thereafter they work on such tobacco in May's packing plant performing the operations heretofore described (RK 120).[11] See also the finding of the District Court to like effect (RK 133-134) and the finding of the Court of Appeals that

> "The majority of all such employees [those working at the packing plant] work also on the farms, when not engaged in work at the packing plants (RK 171)."

The parties stipulated (RK 112-113) that (a) May employs many of its employees "engaged in the handling of tobacco" in and about its place of business at Quincy, Florida, i.e., its packing plant, at wage rates less than 75 cents an hour, and (b) May does not keep the records of hours worked each workday and each workweek for its said employees as prescribed by the Administrator's Regulations, Part 516, Title 29, Ch. V, Code of Federal Regulations. This is the only evidence as to May's failure to comply with the minimum wage and record-keeping provisions of the Act.[12]

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[11] During the packing season May customarily transports these employees by truck from their homes on the farms to its packing plant (RK 72, 120).

[12] A similar stipulation appears in the Record as to King Edward (RK 80-81).

As already observed, in all material respects the facts as to King Edward are substantially the same as those set forth as to May (see RK 80-81, 84-92, 97-98, 101-102, 103-104, 110-111, 168-170), except that (i) King Edward's tobacco acreage is 206, instead of 90, acres (RK 170); (ii) some of the King Edward farms are 13, rather than 10, miles distant from its packing plant here involved (RK 86); (iii) the Record does not disclose how much the sales of tobacco from its said packing plant have averaged, nor does the Record disclose the weight of the tobacco crop handled by King Edward at said packing plant in any year;[13] (iv) King Edward employs 120, instead of 70, employees at its said packing plant (RK 171); and (v) the Record does not show what percentage of the employees at said packing plant live on farms, but it does show that a "large proportion" do (RK 148, 151). Moreover, King Edward does not own but rather leases its farm lands and packing plant from an affiliated company.

2. *Budd*

Budd grows no tobacco of its own but operates a packing plant in Quincy, Florida, employing 108 persons (RB 90, 217, 252), at which it handles and prepares for market the tobacco grown by others on their farms (RB 212-213, 251), all located within a radius of 30 miles of Budd's plant (RB 59, 212, 249). Budd's packing plant operations are essentially the same as May's (RB 60-61, 72-74, 100, 201, 204). Its employees, who for the most part live all year around on the tobacco farms, work earlier in the year in growing the tobacco which they thereafter work on at Budd's packing plant (RB 62-63, 226, 252).

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[13] An affidavit of an employee of Petitioner (RK 23-24), which was offered in opposition to King Edward's motion for summary judgment, referred to page 11, *infra*, allegedly sets forth the poundage of all tobacco handled by King Edward at three packing plants that it operates, including the one here involved, but the affidavit gives no information as to the amount handled in said packing plant alone.

3. Quincy, Florida, is an agricultural community in which about 60 per cent of the income of the population is estimated to be farm income. (RK 18). The principal source of cash income to Quincy comes from the raising of U. S. type No. 62 tobacco (RB 62). Employment on farms in Quincy and within one mile thereof is a substantial part of all employment in that area and moreover close to 50 per cent of the wage earners in the area reside on farms (RK 18).

4. Based upon the complaint against it and upon its answer and supporting affidavits, King Edward moved for summary judgment (RK 10-19, 60, 99-100). With petitioner opposing the motion, the District Court denied it, holding that the action could not appropriately be disposed of on motion for summary judgment (RK 61-64). Subsequently, however, the District Court itself suggested that all parties file motions for summary judgment (RK 100, 151-152; RB 214-215), and when this was done (RK 82-84, 111-112, 116; RB 210-211), awarded summary judgment in each case to the Petitioner. (RK 97-107, 135, 136-138; RB 212-221, 228, 229-231). The District Court held that Budd's packing plant employees are clearly subject to the Act (RB 218) and that with respect to King Edward and May, the exemption for agriculture in the Act ends when the tobacco reaches the receiving platform of the packing plant, and accordingly the packing plant employees are not exempt under the agriculture exemption (RK 106-107, 171). As for the "area of production" exemption of Section 13(a)(10) the District Court held, without assigning any reason, that such exemption also does not apply to the packing plant employees of King Edward and May (RK 106-107).

The Court of Appeals reversed the Judgment in both cases. It held that (1) the agriculture exemption in the

Act applies to the packing plant employees of both King Edward and May because the work of such employees

> "in the preparation for market of the leaf grown exclusively on their farms, constitutes 'practices performed by a farmer as an incident to or in conjunction with such farming operations, including preparation for market' within the meaning of Section 203(f)" (RK 171-172);

and (2) the Section 13(a)(10) exemption in the Act applies to the packing plant employees of all three Respondents (RK 173, RB 254). In this latter connection the Court held that since all the work done in the packing plants is admittedly essential for the marketing of the tobacco, such work is among the operations enumerated in Section 13(a)(10). *Id.* The Court also recognized that the packing plants do not satisfy the condition in the Administrator's definition of "area of production" that they be located outside of a town of 2500 or more population, but it held that the Administrator exceeded his authority in excluding from the "area of production" any town of 2500 or more population, particularly as applied to the factual situation here presented (RK 172, note 7; RB 253, note 7). It further held that the Administrator was not entitled to an injunction until he made a valid definition of "area of production" because Respondents might "likely fall with [in] a valid definition" (RK 174; RB 255).

ARGUMENT

I

THE DECISION BELOW, HOLDING THE PACKING PLANT EMPLOYEES OF KING EDWARD AND MAY EXEMPT UNDER THE AGRICULTURE EXEMPTION IN THE ACT, IS SUSTAINED BY THE CORRECT CONSTRUCTION OF SAID EXEMPTION UNDER APPLICABLE DECISIONS OF THIS AND OTHER COURTS; AND THERE IS NO EXISTING CONFLICT OR UNCERTAINTY AMONG THE CIRCUITS ON THIS ISSUE.

1. Despite Petitioner's contrary contention (Pet., pp. 21-24), the decision of the Court of Appeals, holding the packing plant employees of King Edward and May exempt as being "employed in agriculture", is consistent with this Court's recent decision in *Maneja* v. *Waialua Agricultural Company*, 349 U.S. 254.

(a) In the *Waialua* case this Court held that the sugar milling operation of a large Hawaiian sugar plantation was not within the agriculture exemption in the Act, even though the only sugar cane milled was that grown by the plantation itself on its own farm. Recognizing that the status of farmers milling their own sugar vis-à-vis the agriculture exemption may well be *sui generis* (349 U.S. at 267), this Court placed major emphasis upon the omission of sugar milling from the exemption of Section 13(a)(10). *Id.* Bearing in mind the purpose of Section 13(a)(10) to prevent discrimination against the small farmer (*id.*, p. 268); this Court held that Congress would not have omitted sugar milling from the "area of production" exemption of Section 13(a)(10) if it had not concluded that it also fell outside the agriculture exemption. *Id.*

But the Court's discussion makes it clear that if an operation, such as canning, packing, or ginning, is in-

cluded within the "area of production" exemption, it is likewise within the agriculture exemption when performed by a farmer upon his own products. *Id.* And the Court also made it clear that in its view most forms of processing of agricultural commodities—other than sugar milling—are in fact included within the "area of production" exemption. *Id.*

Petitioner objects that this construction of the agriculture exemption gives companies like King Edward and May a decided advantage over small farmers, who cannot have their tobacco prepared for market by employees exempt from the Act, because allegedly the tobacco packing plants in which they have their tobacco so prepared are outside the "area of production" as defined by the Administrator (Pet. pp. 23-24). But the decision in the *Waialua* case, that an operation was included in the agriculture exemption only if it was also included in Section 13(a)(10), was not made to turn upon whether the "area of production" definition was also satisfied. Indeed the Court specifically stated that cotton ginning, if performed by the farmer upon his own crops, is exempt under the agriculture exemption (349 U.S. at 267) and it implied as much with respect to canning and packing and in fact most forms of quasi-industrial processing of agricultural commodities other than sugar milling, because all such operations are also enumerated in Section 13(a)(10). *Id.*, p. 268. Yet, undoubtedly, many gins, canneries and packing plants are located in towns of 2500 or more population and hence do not meet the Administrator's definition of "area of production". See p. 29 *infra*. Petitioner's argument would inevitably lead to the conclusion that a farmer is never exempt under the agriculture exemption in canning, packing, ginning, etc. his crops for market, because, as the Administrator has recognized, there are always some independent plants engaged in the same activities which do not fall within the "area of production" as defined by the Administrator. See Administra-

tor's Findings published in connection with his definitions of "area of production" (Pet., App. B, p. 52).

The legislative history is also clear that while Congress sought in Section 13(a)(10) to prevent discrimination against the small farmer, it did not make the Section 13(a)(6) exemption dependent upon whether it had succeeded in every instance in preventing such discrimination. *Infra*, pp. 18-19, Appendix, pp. 32 *et seq.*[14]

(b) Another factor, upon which this Court relied in excluding from the agriculture exemption the sugar milling operation in the *Waialua* case, was that sugar milling is *specifically* granted a complete exemption from the overtime requirements of the Act by Section 7(c). 349 U.S. at 267. But no comparable exemption is *specifically* granted in Section 7(c) to the operations involved here upon tobacco; in fact tobacco as such is not even mentioned in Section 7(c).

(c) This Court also pointed in the *Waialua* case to the fact that sugar milling operations are not a normal incident to the cultivation of sugar cane in Hawaii. 349 U.S. at 267. The situation here is totally different for 70 per cent of all type 62 tobacco grown in the Quincy area is bulked and prepared for market in the packing plants of the growers (RK 102).[15]

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[14] It is an interesting sidelight that Petitioner has recognized that his "area of production" definition has itself created competitive inequities (Pet., pp. 19-20, notes 8 and 9; 19 Fed. Reg. 4481-4482). See also the Petitioner's admission in the *Budd* case that Section 13(a)(10) "is a complete section in itself and cannot be defined or interpreted by reference to other sections of the Act" (RB 89).

[15] The District Court found that of the 2554 acres planted with this type tobacco in the Quincy area, 1459 are grown by companies operating packing plants in which they handle only tobacco grown by themselves, and an additional 311 acres are grown by companies which handle in their own packing plants the tobacco grown on such acreage and also tobacco grown by independent farmers (RK 102).

(d) Other factors emphasized in the *Waialua* case as of significance in determining the application of the agriculture exemption are also present here:

(i) The product resulting from Respondents' operation is fermented tobacco. Fermentation involves only natural—not artificial—changes in the tobacco (*supra*, pp. 7-8), and the Court below so held (RK 170). No basis exists therefore for analogizing the process involved here to manufacturing. 349 U.S. at 264-265.

(ii) The same working force works on the farms and in the packing plant. *Supra*, p. 9. 349 U.S. at 265.

(iii) There is no industrialization involved in the tobacco packing operation. *Supra*, pp. 6-8; see also RK 132. 349 U.S. at 265.

2. The decision below is likewise in full harmony with this Court's only other decision relating to the agriculture exemption in the Act, namely, *Farmers Irrigation Company* v. *McComb*, 337 U.S. 755. There this Court said with respect to the work of the cooperative irrigation company involved (337 U.S. at 766):

> ". . . coming to the second branch of the definition of agriculture . . . it does constitute a practice performed as an incident to or in conjunction with farming. If the Act exempted all such practices, the company would be exempt. But the exemption is limited. Such practices are exempt only if they are performed by a farmer or on a farm.[15]

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[15] Although not relevant here, there is the additional requirement that the practices be incidental to 'such' farming. *Thus, processing on a farm of commodities produced by other farmers is incidental to or in conjunction with the farming operation of the other farmers* and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture. Bowie v. Gonzalez, 1 Cir., 1941, 117 F.(2d) 11". [Emphasis supplied]

This Court thus clearly stated that the processing of farm commodities is incidental to or in conjunction with the farming operation by which the commodities are produced. It necessarily follows that the processing by the farmer of commodities produced by the same farmer is incidental to or in conjunction with the farming activities of that farmer, and hence is within the agriculture exemption. That is precisely the situation involved here.[16]

3. The decision below is not only consistent with this Court's decisions; it is obviously correct under the statutory language, its legislative history, and its administrative construction. Thus:

"Employment in agriculture is probably the most far reaching" of the exemptions in the Act. *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 612. "The exemption was meant to embrace the whole field of agriculture . . ." *Maneja* v. *Waialua Agricultural Company*, 349 U.S. at 260.

The statutory definition of "agriculture" (Section 3(f)) is divided into two distinct branches. The first distinct branch is "farming in all its branches and among other things includes the cultivation and tillage of the soil, . . . the production, cultivation, growing, and harvesting of any agricultural . . . commodities . . .". See *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755 at 762. The second distinct branch of the statutory definition of "agriculture", which this Court has termed the broader meaning (*id.*), includes "practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such

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[16] The following lower court decisions likewise support the existence of the agriculture exemption in the circumstances here presented: *Walling* v. *Rocklin*, 132 F.(2d) 3 (C.C.A. 8); *Damutz* v. *Pinchbeck*, 158 F.(2d) 882, 883 (C.C.A 2); *Bruno* v. *Hills Bros.*, 7 Labor Cases ¶61763 (D. P. Rico); *Jordan* v. *Stark Bros.*, 6 Labor Cases ¶61468 (W. D. Ark.). See also *Dofflemeyer* v. *NLRB*, 206 F.(2d) 813 (C.C.A. 9); *NLRB* v. *Campbell*, 159 F.(2d) 184 (C.C.A. 5).

farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market". This part of the definition embraces "practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm". *Id.*, 337 U.S. at 763.

Since King Edward and [illegible]nduct the farming operations enumerated in Sect[illegible] of producing, cultivating, growing and harvestin[illegible]o, they are "farmers" in the sense used in that Sectio[illegible] As to their packing plant operations, which are performed only upon their own tobacco (*supra*, pp. 9, 10), both the District Court (RK 101-102) and the Court of Appeals below (RK 171-172, 170) found, in accordance with the undisputed facts in the Record, that such operations are essential preparatory steps to marketing the tobacco (RK 60, 89 *et seq.*, 121 *et seq.*; see also R. 39 *et seq.*). The undisputed facts further show that the entire process of caring for the to[illegible]o, from the time that it is first hung in the curing barns on the farms until the time the bulking is completed in the packing plant, is one continuous and integrated process, largely performed by the same employees who grow and harvest the tobacco on King Edward's or May's farms. *Supra*, pp. 7-9. The packing plant activities are accordingly exempt as being practices "incident to or in conjunction with" farming, as the Court below held (RK 172).

The all-embracing scope of the "agriculture" exemption is fully borne out by its legislative history. Senator Black, Chairman of the Senate Committee on Education and Labor and in charge of the bill that became the Fair Labor Standards Act, stated that bottling milk, packing apples, ginning cotton, slaughtering and preparing hogs for market—all highly industrialized operations—were intended to be exempt if such operations were performed by a farmer upon his own produce. 81 Cong. Rec. 7656.

7657, 7659. Congress made this doubly clear by adopting Senator McGill's amendment providing that the agricultural exemption should apply not only to practices ordinarily performed by a *farmer* as an incident to his farming operations, but also to practices performed *on a farm* as an incident to such farming operations. 81 Cong. Rec. 7888. His amendment further added to the exemption the words "delivery to market". The stated purpose of the McGill amendment was to exempt all kinds of work done on a farm so long as it was incidental to agricultural purposes and was preparatory to marketing the field crop, and all kinds of labor performed in connection with delivery to market of agricultural products. 81 Cong. Rec. 7888, 7927, 7928.[17]

The foregoing analysis is in full harmony with the administrative interpretations of the agriculture exemption by Petitioner and the Administrator. See *Interpretative Bulletin No. 14*, U. S. Department of Labor, issued August 1939 and still outstanding (3 CCH Labor Law Reporter ¶24,488 and WHM 35:351) ¶¶10, 10(b), (c), (d), (e) and (f) and ¶12: *Hearings on S. 1349*, Comm. on Education and Labor, 79th Cong., 1st Sess., p. 236; *Hearings on H. R. 2033, Comm. on Education and Labor*, 81st Cong., 1st Sess., pp. 79, 97; WHM 35:752-753; see also Petitioner's admissions in the *Budd* case (RB 88-89).

Interpretative Bulletin No. 14, ¶¶10 and 10(b), states that where a farmer performs the type operations here

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[17] The legislative history shows that Congress started with a very broad, comprehensive definition of agriculture, and that such definition at every stage of its consideration by one or the other of the Houses of Congress, as the bill worked its way through to passage, was made more and more all-inclusive. *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 260; S. Rep. 884, 75th Cong., 1st Sess., p. 6; 81 Cong. Rec. 7648; H. Rep. 1452, 75th Cong., 1st Sess., pp. 4-5, 11; H. Rep. 2182, 75th Cong., 3d Sess., pp. 2, 8; 83 Cong. Rec. 9162-9163, 9246-9247. Without the broad definition of "agriculture" which was written into the bill, it is a reasonable conclusion from the legislative history that the bill would not have been enacted into law (83 Cong. Rec. 7393, 9257).

involved upon only his own tobacco, such operations fall within the agriculture exemption; and unlike the similar administrative interpretation as to sugar milling (see *Waialua* case, 349 U.S. 254 at 269), the interpretations as to tobacco processing have never been altered. In these circumstances Petitioner's present effort, which is also his first effort,[18] to alter such interpretations is contrary to this Court's holding in *Walling* v. *Halliburton Co.*, 331 U.S. 17, 25-26[19] (*cf. U. S.* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549), particularly since such altered interpretations are inconsistent with the language of the exemption provision, its legislative history, the case law, and with Petitioner's continued recognition of the exemption of processing of other commodities such as fruit packing and canning, canning dairy products, and cotton ginning. *Skidmore* v. *Swift*, 323 U.S. 134, 140; *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U.S. 161, 169.

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[18] Since the original enactment of the Act in 1938 a Federal Wage and Hour Office has been maintained in Florida, manned with personnel engaged in the enforcement of the Act. *Annual Reports* to Congress of the Wage and Hour and Public Contracts Divisions: 1939, Chart XVII, p. 122; 1948, Chart 1, page 3; 1951, p. ii; 1953, p. iii. Frequent inspections have been made through the years of tobacco packing plants in the Quincy area to check on compliance with the Act. At no time until the present case have the Petitioner or Administrator sought to enforce the Act with respect to employees of such packing plants, when the plants handle and prepare for market only the tobacco they grow themselves. To the contrary, in administering the Act, the Wage and Hour officials have always treated such employees as exempt.

[19] See also *Miller Hatcheries* v. *Boyer*, 131 F.(2d) 283 (C.C.A. 8).

II

THE DECISION BELOW THAT THE OPERATIONS PERFORMED AT THE PACKING PLANTS OF ALL THREE RESPONDENTS ARE AMONG THE OPERATIONS ENUMERATED IN SECTION 13(A)(10) IS SUSTAINED BY THE CORRECT CONSTRUCTION OF THAT EXEMPTION UNDER APPLICABLE DECISIONS OF THE COURTS; AND THERE IS NO EXISTING CONFLICT OR UNCERTAINTY AMONG THE CIRCUITS ON THIS ISSUE.[20]

1. The legislative history of Section 13(a)(10) fully supports the ruling below (RK 173, RB 254) that Respondents' packing plant operations are among the activities enumerated in Section 13(a)(10). That history shows that Congress intended to exempt workers engaged in processes necessary for the marketing of agricultural products, including tobacco, and particularly the "first processing of things that come off the farm" (*Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 612; 83 Cong. Rec. 7401, 7407-7408, 7428). Moreover the ruling below is in harmony with the other decided cases: *Puerto Rico Tobacco Marketing Cooperative Association* v. *McComb*, 181 F.(2d) 697, 698-699, 701-702 (C.C.A. 1); *Fleming* v. *Farmers Peanut Co.*, 128 F.(2d) 404, 407 (C.C.A. 5); *Sanabria* v. *Valiente and Co.*, 9 Labor Cases ¶62643 (D. P. Rico).

2. The decision of the Court of Appeals is also clearly correct on the facts of record. So far as King Edward and May are concerned, the only evidence of any alleged

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[20] If this Court concludes, as we believe it should, that for the reasons set forth in Point I of our Argument, the writ prayed should be denied as to King Edward and May, Points II and III of our Argument apply only to Budd. Obviously the question of the application of the Section 13(a)(10) exemption to the operations of King Edward and May is immaterial if the Section 13(a)(6) agriculture exemption applies to them.

violation of the Act appears in a stipulation, stating that many employees at their packing plants, engaged in the "handling" of tobacco, are paid wage rates less than 75 cents per hour (RK 80-81, 112-113). "Handling", of course, is an operation specifically listed in Section 13(a)(10).

Elsewhere in the Record, it appears only that the employees at all three Respondents' packing plants are engaged in bulking, shaking, sorting, separating, grading, tying and baling tobacco. *Supra*, pp. 8-9; RB 201; 204. All such operations fall squarely within the terms "handling", "packing", "storing" and "drying", both as commonly understood (*Webster's New International Dictionary*, Unabridged Version, 2d. ed., 1951, pp. 793, 1133, 1750, 2486) and as defined by the Administrator (*Interpretative Bulletin No. 14*, WHM 35:351, ¶¶26, 27, 28 and 32). Petitioner's unsupported statement (Pet., p. 25) that the term "drying" does not include the bulking operation here involved is in conflict not only with *Interpretative Bulletin No. 14*, ¶32, but also with the uncontradicted facts of Record, which show that the bulking operation is indeed a "drying" operation (RK 87, 89, 91, 119, 121-122, 123; RB 60-61, 72-73, 100; see also the expert evidence appearing at RK 46-47).

3. Petitioner's assertion (Pet., p. 26), that tobacco bulking is a "manufacturing operation"[21] in the course of which the tobacco is very substantially "changed from its 'raw or natural state'" into an industrial product and is no longer an "agricultural or horticultural commodity"

[21] Petitioner seeks to convey the impression that Respondents' packing plant operations are complex, extensive and industrial (Pet., pp. 24-26). The facts of Record show otherwise. *Supra*, pp. 6-8. In any case Petitioner has himself admitted that operations may be exempt under Section 13(a)(10), even though they are complex and industrial, *e.g.* packing and drying fruits: *Interpretative Bulletin No. 14*, ¶¶27, 32.

within the meaning of Section 13(a)(10), conflicts with the statutory language, the Record, the finding of the Court below, and the legislative history underlying Section 13 (a)(10).

The words "in their raw or natural state" in Section 13 (a)(10) are not separated by a comma from the word "preparing" but come immediately after that word. Hence, they modify only that word and not the words "handling", "packing", "storing" and "drying". Moreover, in any event, the Record shows that fermenting tobacco through the bulking process, like the ripening operation on fruit, involves no artificial change in the tobacco, but only natural chemical changes within the tobacco leaves, without the application of heat or any other external element by human means (*supra*, pp. 7-8), and the Court below so found (RK 170).

As for the legislative history, it shows that as the exemption was first introduced in Congress, it was limited to the operations of preparing, packing and storing fresh fruits and vegetables in their raw or natural state (81 Cong. Rec. 7876, 7949), but was subsequently broadened to include these operations upon all *agricultural commodities* in their raw, natural or *dried* state (82 Cong. Rec. 1783, 1784; H. Rept. No. 2182, 75th Cong. 3d Sess., p. 2) and finally, broadened still further by the adoption in the House of the Biermann amendment, which contained language very much like that in Section 13(a)(10) as finally enacted. 83 Cong. Rec. 7401, 7407-7408. In the face of this history, no basis exists for restricting the term "agricultural commodities" to the narrow meaning which Petitioner would ascribe to it. In the absence of any special statutory definition, the term should be given its commonly understood meaning (*Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 618) and within such common meaning, tobacco, although fermented, is still an agricultural commodity.

4. Petitioner argues that since the operations here involved constitute first processing within the meaning of the limited overtime exemption granted by Section 7(c), they cannot be deemed included under Section 13(a)(10), for then the Section 7(c) exemption becomes meaningless (Pet., pp. 26-28).

But the Administrator's interpretations of long standing include the operations here involved, i.e., fermenting and drying tobacco, in both the "first processing" exemption of Section 7(c) and the exemption of Section 13(a)(10). See *Interpretative Bulletin No. 14*, ¶¶20 and 32 and also a statement submitted by the Administrator to a subcommittee of the Senate Labor Committee in 1948. *Hearings on S. 49 and other bills*, Sen. Comm. on Labor & Public Welfare, 80th Cong. 2d Sess., p. 86; WHM 35:715, 719.[22] Furthermore, there are many other operations which Section 7(c) specifically exempts and which Section 13(a)(10) also specifically exempts, *viz.*, the ginning and compressing of cotton, the first processing of milk into dairy products, and the first processing (including drying—see *Interpretative Bulletin No. 14*, ¶19), canning or packing of fresh fruits or vegetables. True, the Section 7(c) exemption for these operations is not restricted to employees employed within the "area of production"; but to the extent that employees are engaged in these operations within the "area of production", it is plain that the Sections 7(c) and 13(a)(10) exemptions overlap. This overlapping, which was recognized by the Court below (RK 173-174),[23] is due to the solicitude of Congress in enacting the

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[22] The interpretation now urged by Petitioner that the operations here involved do not fall within Section 13(a)(10) is a comparatively new interpretation (*cf.* note 24, *infra*) which seeks to overturn the prior interpretations of long standing. As such it is entitled to no weight. See cases cited *supra*, p. 20.

[23] *Cf. Waialua Agricultural Co.* v. *Maneja*, 178 F.(2d) 603, 609 (C.C.A. 9).

law toward agriculture and industries engaged in processing agricultural commodities. See in particular 83 Cong. Rec. 7325, 7326, 7401, 7402, 7407-7408; and see also 81 Cong. Rec. 7648-7673, 7876-7888, 7927-7929, 7947-7949, 7957 and 83 Cong. Rec. 7419, 9162-9163, 9250, 9252 and 9254.

And even with respect to the part of Section 7(c) which is restricted to employees within the "area of production", namely, first processing of agricultural commodities, that exemption and the exemption in Section 13(a)(10) overlap in many respects. Thus, for example, the drying of furs or hay is the first processing of an agricultural commodity within the meaning of Section 7(c) and also constitutes the drying of an agricultural commodity within the meaning of Section 13(a)(10). *Interpretative Bulletin No. 14*, ¶¶ 20, 32.

5. Contrary to Petitioner's contention (Pet., pp. 28-29) the interpretation of Section 13(a)(10), which he seeks here, was not ratified by the 1949 Amendments to the Act. Not only was such interpretation never reported to Congress (*cf. Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 269), but as late as 1948 Congress was advised that Petitioner's interpretation was to the contrary. *Supra*, p. 24.[24] Moreover, Congress' consideration of Section 13(a)(10) in 1949 was only in connection with the problem of the "area of production" limitation and not in connection with the problem of what activities are embraced by the section. See conference report on 1949 Amendments, *H. Rep. 1453*, 81st Cong., 1st Sess., p. 28.

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[24] Note also that until November 1948 or for some ten years after the law was enacted, the Administrator had outstanding a special definition of "area of production" for Puerto Rican leaf tobacco. It was plain under that definition that the operations of bulking and fermenting tobacco were considered operations described in Section 13(a)(10). 3 CCH Labor Law Reporter, ¶23281, note 1.

III

THE RULING BELOW THAT THE ADMINISTRATOR'S DEFINITION OF "AREA OF PRODUCTION" IS INVALID TO THE EXTENT THAT IT EXCLUDES ANY TOWN OF 2500 OR GREATER POPULATION IS CORRECT AS APPLIED TO THE FACTUAL SITUATION HERE; AND SUCH RULING PRESENTS NO REAL CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IN THE TRADERS COMPRESS CASE.

1. *Tobin* v. *Traders Compress Company*, 199 F.(2d) 8, *cert. den.* 344 U.S. 909, *reh'g. den.* 344 U.S. 931, involved a cotton compress establishment, located in a city of over 30,000 persons, and drawing a substantial percentage of its cotton from distances of more than 50 miles—in fact up to 250 miles.[25] The establishment, therefore, failed to meet either the mileage or the population tests of the Administrator's definition of "area of production" (see Pet., pp. 13, 17, note 6). Under the definition both tests must be met (Pet., pp. 12-13). The establishment not having met the mileage test, which would appear to be a valid test in any area of production definition (see *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 611; *Tobin* v. *Traders Compress Company*, 199 F.(2d) 8, 11), it was unnecessary for the Court of Appeals for the Tenth Circuit also to pass upon the validity of the population test. What it said on that subject must therefore be regarded as *dictum* and as constituting no basis for any conflict with the decision of the Court of Appeals below.

Furthermore, the decision in the *Traders Compress* case is easily reconcilable on its facts with the decision below. *Cf. Armour* v. *Wantock*, 323 U.S. 126, 132-133.

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[25] See the District Court decision in the case, 107 F. Supp. 354, 358-359 (E. D. Okla.).

As already observed, the *Traders Compress* case involved a cotton compress establishment which was not only located in a city of over 30,000, but drew some of its cotton from as far away as 250 miles. In those circumstances a definition of area of production excluding such establishment would appear reasonable. In contrast, in the instant case the town of Quincy, in which Respondents' tobacco packing plants are located, is but a small agricultural community of some 6500 (*supra*, pp. 5, 11; see also RB 62), and the plants draw all their tobacco from an immediately adjacent and compact area—in May's case from up to ten miles away, in King Edward's from up to thirteen miles, and in Budd's from up to thirty miles. The type 62 tobacco prepared for market in packing plants in Quincy is produced within a radius of thirty miles of Quincy (RK 87, 98, 168); and of the five million pounds of tobacco grown annually in that area, three million pounds are processed in tobacco packing plants in Quincy (RK 87). Moreover, 60 per cent of all type 62 tobacco grown in Gadsden County, Florida, where Quincy is located, is processed in tobacco packing plants in Quincy (RK 13, 88), and largely by the same employees who grow it. *Supra*, p. 9.[26] See also the U. S. Department of Agriculture map reproduced on the following page which establishes clearly that Quincy is in the very heart of the growing area of U. S. Type No. 62 tobacco.[27] In

[26] More than 185 acres of type 62 tobacco, producing substantial quantities of tobacco, are grown within one air-line mile of Quincy (RB 64-65).

[27] Compare also the definition of "production area" made by the Secretary of Agriculture for type 62 tobacco in a marketing order regulating the handling of such type tobacco pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U.S.C. §601 *et seq.*). The Secretary of Agriculture defined such "production area" as meaning those counties bordering the Georgia-Florida state line and lying between the Suwanee River on the east and the Flint and Apalachicola Rivers

the light of these facts, as the Court below correctly observed,

> "It seems particularly clear that the Administrator did exceed his authority as to the area of production involved in this particular case" (RK 172, note 7).[25]

2. In the *Holly Hill* case, 322 U.S. 607, this Court concluded that Congress, in conferring power upon the Administrator to define area of production

> ". . . restricted the Administrator to the drawing of geographic lines, even though he may take into account all relevant economic factors in the choice of areas open to him" (322 U.S. 607, 619).

As pointed out by Judge Pickett, dissenting in the *Traders Compress case* (199 F.(2d) at 12), this means that the Administrator may take into consideration "all relevant economic factors" necessary to determine the geographic lines of the area of production. But if a plant is within the geographic lines established, as Respondents' plants here are, *supra*, p. 27, no reasonable basis exists for discriminating against those of such plants as are located in a town with a population of 2500 or more. As also pointed out by Judge Pickett, *supra*, generally the population of a city or town has no reasonable relation

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on the west: 17 Fed. Reg. 3509; see also 17 Fed. Reg. 3501 and 3502 (April 19, 1952). Gadsden County in Florida is but one of such counties.

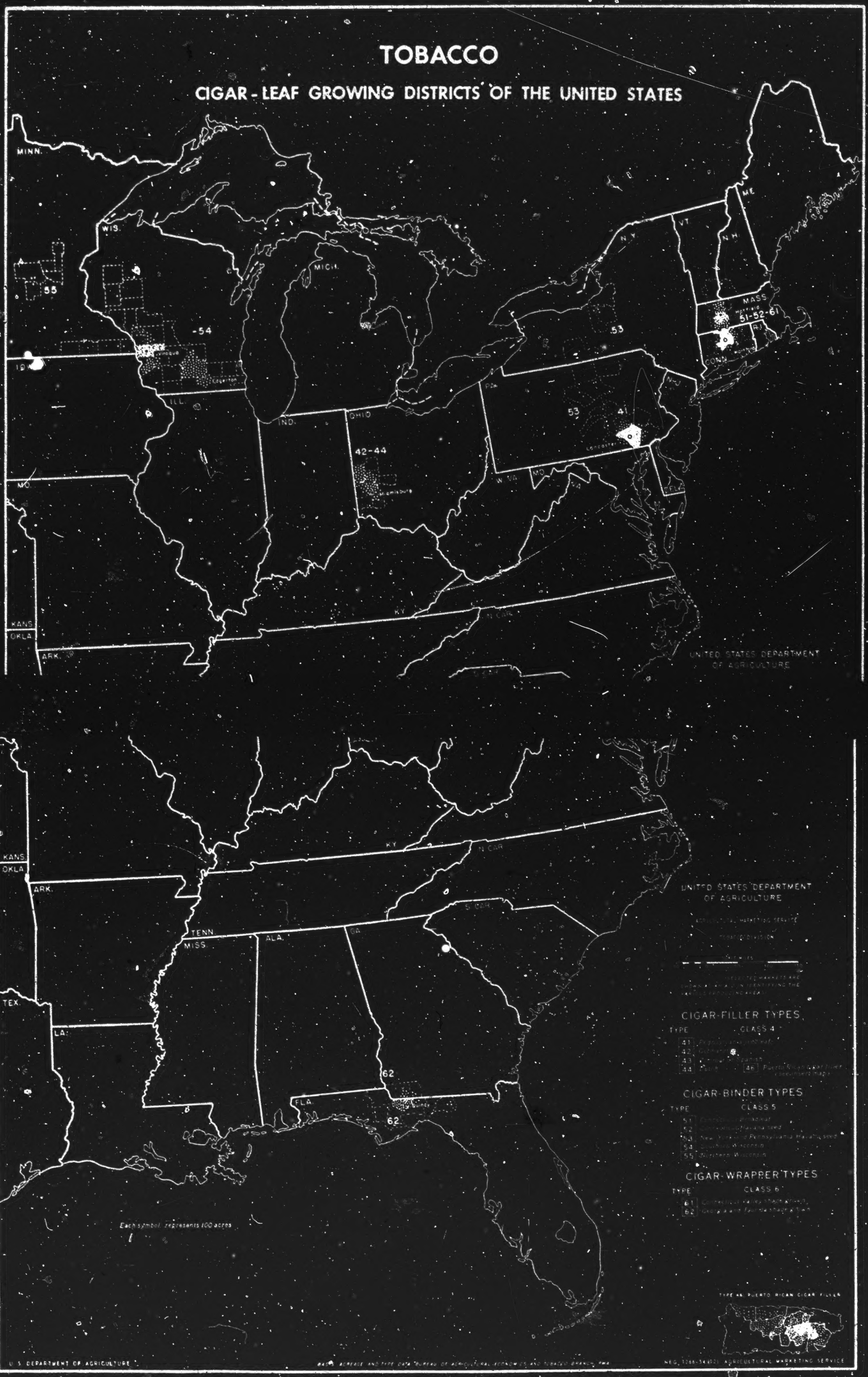
[25] It should also be noted that the Administrator himself has reported to Congress with respect to the area of production exemption:

> "This provision, especially as now defined in accordance with the opinion of the Supreme Court in the case of *Addison et al.* v. *Holly Hill Fruit Products, Inc.* (322 U.S. 607), results necessarily in economic discrimination and in competitive inequalities which not only make the provision very difficult to administer but are basically unfair."

Hearings on S. 49 and other bills, Sen. Comm. on Labor & Public Welfare, 80th Cong. 2d Sess., p. 82.

TOBACCO

CIGAR - LEAF GROWING DISTRICTS OF THE UNITED STATES



Map reproduced from Statistical Bulletin No. 157, U. S. Dept. of Agriculture, Annual Report on Tobacco Statistics, 1954, p. 8.

to the question of whether a plant is located within an area of production.

3. The Court below correctly stated (RK 172, note 8) that the primary purpose of Section 13(a)(10) was to prevent discrimination against the small farmer. *Maneja v. Waialua Agricultural Company*, 349 U.S. at 268. The Court below also found that many small farmers in the Quincy area grow only up to 25 acres of type 62 tobacco per year. And this is insufficient for them to process their own tobacco; accordingly, they have it prepared for market by an independent company, *e.g. Budd* (RB 251, 61-62). Clearly, this is precisely the type of case to which Congress intended to accord an exemption under Section 13(a)(10). See "4" below.

4. The legislative history of Section 13(a)(10) fully supports the conclusion that the population limitation in the Administrator's definition of "area of production" is invalid, at least as applied to the facts here.

The debates in the Senate where the provision embodying this exemption originated (81 Cong. Rec. 7656, 7876), confirm that the major reason underlying the exemption was to protect the small farmer unable to do the work of preparing his own crops for market and who would have to bear the cost of operations covered by the Act, unless such operations were exempt. 81 Cong. Rec. 7656-7660, 7876, 7877, 7880. The debates in the House were quite similar. 82 Cong. Rec. 1784; 83 Cong. Rec. 7325, 7326, 7401, 7402, 7405, 7407-7408. The imposition of a population test in the circumstances here seems plainly to thwart the Congressional purpose. In any event Senator Schwellenbach, the sponsor of the exemption, specifically recognized that the world's largest apple packing plant, located in the production area, would be exempt under his amendment, even though it was in the town of Winchester, Virginia, which had a population of over 10,000 according to the 1930 U.S. Census and over 12,000 according to

the 1940 Census. 81 Cong. Rec. 7877. So too a town like Quincy with a population of only some 6500 (RK 18) may not be excluded from the "area of production" simply because of its size.

The House debates evidence some concern that plants located in large cities and in industrial and urban centers should not enjoy the exemption, and there should be a labor differential between the large city and the little town. 83 Cong. Rec. 7401, 7402. But an agricultural community, such as Quincy, Florida, which is neither a large city nor an urban or industrial center (RK 17-18, RB (62); was plainly not intended to be outside the purview of the exemption.

Pertinent portions of the Congressional debates on the "area of production" exemption are set forth in the Appendix pp. 32-38, *infra*.

5. Petitioner places reliance upon the various hearings and conferences held by the Administrator before promulgation of the present area of production regulations (Pet., p. 12). Petitioner admits, however, that its records do not show that any of the producers of type 62 tobacco appeared at any hearing; that any evidence was taken pertaining to the growing of such tobacco; or that the Administrator had any evidence specifically in connection with type 62 tobacco (RB 88).[29]

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[29] The Court below correctly held (RK 174, note 10) that Petitioner was not entitled to an injunction until he issued a valid definition of "area of production" excluding Respondents' plants. *Walling* v. *McCracken County Peach Growers Ass'n.*, 50 F. Supp. 900, 905-906 (W.D. Ky.); *Messenger* v. *Traders Compress Co.*, 107 F. Supp. 354, 361 (E. D. Okla.) *rev'd on other grounds sub nom. Tobin* v. *Traders Compress Company*, 199 F.(2d) 8 (C.C.A. 10). We do not understand Petitioner to contend to the contrary if the definition is invalid; his argument is that the "area of production" definition is valid.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writs prayed should be denied.[30]

Respectfully submitted,

MILTON C. DENBO
1625 K Street, N. W.
Washington 6, D. C.
Attorney for Respondents

Of Counsel:

POOLE, SHROYER & DENBO
1625 K Street, N. W.
Washington 6, D. C.

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[30] Respondents submit that the Court below correctly reversed the judgments of the District Court and awarded judgment to them. But if this Court regards the Record as inadequate to support such ruling of the Court below, it should not in any case review the decision below on the merits, but simply remand the cases to the District Court with instructions that the said Court decide such cases only after full and complete trial of the issues, rather than on motions for summary judgment. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627; *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-257. *Walling* v. *Fairmont Creamery*, 139 F. (2d) 318, 322 (C.C.A. 8). Petitioner himself took this view in opposing King Edward's first motion for summary judgment, *supra*, p. 11. As Petitioner has in effect conceded (RK 20), the allegations in Respondents' answers and affidavits (RK 7-8, 70-71, 85-86, 117-119; RB 58 *et seq.*) and Petitioner's admissions (RB 83-90, 100-101) raise sufficient question as to the application of the exemptions here involved to Respondents' packing plants that at the very least Respondents are entitled to a full trial of the issues. *National Metropolitan Bank* v. *U.S.*, 323 U.S. 454, 456-457; *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. (2d) 878, 881 (C.C.A. 7), *cert. den.*, 347 U.S. 1013. It is immaterial that, at the District Court's insistence (RK 100, 135), Respondents also moved for summary judgment. *Watling* v. *Richmond Screw Anchor Co.*, 154 F. (2d) 780, 784 (C.C.A. 2), *cert. den.* 328 U.S. 870.

APPENDIX

Legislative History of Section 13(a)(10) of Fair Labor Standards Act.

1. *Area of Production concept introduced by Senator Copeland.*

In debate on the floor of the Senate, Senator Copeland read a telegram from the International Apple Association urging that there be exempted the operations of

"preparing for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities." 81 Cong. Rec. 7656

2. *Debates on Senator Schwellenbach's "area of production" amendment which was adopted in the Senate.*

"Mr. Schwellenbach. . . . If we leave the bill the way it now stands, it is going to mean that the large producer on the large ranch who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 or 10 acres, and who has to send his crop to a central warehouse, or who may join with others in a cooperative warehouse, and there have the same processes performed." 81 Cong. Rec. 7659.

"But it seems that, so long as they remain in their natural state and all of the work that is done upon them is the ordinary agricultural operation up to the point of processing, whether they are handled on the farm or by a group of men gathered together in a cooperative, or turned over to a central warehouse, *they should be exempt; because of the fact that if we do not exempt them, we are giving the large producer a very distinct advantage over the small producer, and I am certain it is not the purpose of the bill and is not within the economic theory of the bill to give the large producer an advantage over the small producer.*" (Emphasis supplied). 81 Cong. Rec. 7660.

"Mr. Schweflenbach. The amendment is very strictly drawn in an effort to limit the operations defined therein purely to those of an agricultural nature. . . . In other words, in a small apple operation of 5 or 10 or 15 or 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the washing operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples. Therefore, it is necessary for such a farmer either to join other farmers in a cooperative, or to send his apples to a packing house, and have these operations, which are purely agricultural operations, performed elsewhere than at the situs of the ranch or the farm.

"*The purpose of this amendment is to give protection against that situation, and to make it possible for the small fruit and vegetable producer to operate upon the same basis as the large fruit and vegetable producer.*" (Emphasis supplied). 81 Cong. Rec. 7876. . . .

"In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while the larger producer can afford them, and he is exempt from the provisions of the bill." 81 Cong. Rec. 7877. . . .

"*The purpose of the amendment is not for the protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to have his own warehouse and cannot afford to have his own washing machine, to be placed upon a parity with the larger producers, who can afford to maintain their own warehouses and their own washing machines and their own equipment.*" (Emphasis supplied). 81 Cong. Rec. 7877. . . .

"Mr. Connally. Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple territory? There is no limit. The condition is that they are packing plants and if they are, they are exempt.

"Mr. Schwellenbach. If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the immediate production area, it would be exempt.

"Mr. Connally. *My understanding is that the largest apple-packing plant in the world is located at Winchester, Va., right in the heart of a great apple-producing region. That would be exempt, would it not?*

"Mr. Schwellenbach. *If the work done in that plant is as described in the amendment, it would be exempt.*" (Emphasis supplied). 81 Cong. Rec. 7877.

3. *Debates in House on Lea-Lucas amendment, broadening Senator Schwellenbach's amendment to cover all "agricultural commodities" and not only "fresh fruits and vegetables".*

"Mr. Lea. Mr. Chairman, Subsection (20) grants an exemption to labor engaged in preparing, packing or storing fresh fruits and vegetables within the area of production. This amendment is necessary to give to the fruit industry, and agriculture generally, that exemption that has been promised and which is clearly within the purpose of the bill. The defect in Subsection (20), as it stands, is that it is confined to fresh fruits and vegetables and omits all other farm products equally entitled to the exemption. Part of the farmer's labor should not be in the bill and the same laborers exempted when performing other agricultural labor.

"Mr. Keller. Fresh or not fresh?

"Mr. Lea. Fresh or not fresh.

"Mr. Keller. That is what I am asking the gentleman.

"Mr. Lea. The section is confined to fresh fruits and vegetables and omits to give similar exemptions to all other products. Mr. Chairman, I am agreeable

to the substitute of the gentleman from Illinois (Mr. Lucas), which would include agricultural commodities and relieve the section of the unfair discrimination it now contains.

"Mr. Keller. What does that mean?

"Mr. Lea. Ordinary agricultural commodities of the farm.

"Mr. Keller. What does the gentleman mean by that?

"Mr. Lea. The exemptions of this section are confined to preparing, storing, and packing in the area of production. . . .

"Mr. Lucas. . . . This amendment merely provides that a 'person employed in agriculture' shall include persons employed within the area of production engaged in preparing, packing, or storing agricultural commodities in the raw or natural state.

"It broadens the definition and will adequately protect the farmers of my section. It exempts agriculture in all its branches and work incidental thereto, including the necessary handling and preparing for market commodities when performed by the farmer or by a farmer's owned and controlled cooperative. It should be understood that it applies only to the employees in the area to be determined by the Administrator where the commodity is produced. . . ." 82 Cong. Rec. 1783, 1784

4. *Definition of "employee employed in agriculture" in bill as reported by House Labor Committee at the 3d Session of the 75th Congress.*

The bill as reported out by the House Labor Committee in the 75th Congress, 3d Session, broadened the definition of "employee employed in agriculture" (which contained the area of production exemption) so as to include operations upon "agricultural commodities" in their "dried state" as well as in their "raw or natural state". The exemption as reported read:

"'Employee employed in agriculture' includes individuals employed within the area of production engaged in storing for the farmer, preparing (but not

commercial processing), or packing agricultural or horticultural commodities in their *raw, natural or dried state*, but does not include employees of transportation contractors engaged in transportation of farm products from farm to market." (Emphasis supplied). *H. Rept. No. 2182*, 75th Cong., 3rd Sess., p. 2.

5. *Debates on Biermann amendment, the immediate forerunner of Section 13(a)(10)*

"Mr. Biermann. . . . Nearly every large farm organization in the United States has endorsed this amendment. I know of none that opposes it. It is a well-known fact that most of the cost—in most cases all of it—of running these farm factories is taken out of the amount the farmer receives for his product. . . . Now why do we want farm factories exempted from the terms of this bill? Because they have to be conducted in most cases in a way very different than the way the big factory is run. . . . The employees in these farm factories are not complaining. They know the nature of their business requires elastic hours—and they know that the rigid rules laid down in this bill would not work in the farm factories. We should not disrupt these little businesses, which are handling farm products directly from the farm and which are supplying good jobs to satisfied employees. . . . The amendment I have proposed would strengthen this bill without sanctioning substandard labor. It would save the farmers of America from an expense they should not be subject to. No good purpose would be served by including farm factories in this bill. Wage and hour legislation on a national scale is an experiment in America. Is it not wise to move cautiously? The bill is framed with big factory conditions in mind. Why include little farm factories, where labor conditions are good? The organized farmers of America ask that this amendment be adopted. Its adoption would not weaken the bill. The bill is aimed at substandard labor conditions. We ask you to exempt industries in which substandard labor conditions do not exist." 83 Cong. Rec. 7325, 7326. . . .

"The amendment I have offered *includes only the first processing of things that come off the farm. The important point is that the farmer pays the bill for this processing.* Those of us who come from dairy sections know that the cost of making butter fat into butter or milk into cheese is borne by the farmer. There is no contention about that, no argument. The members from the South will agree that the man who raises the cotton pays for ginning the cotton. *When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increases the farmer gets just so much less,* and our contention and the contention of the farm organizations is that the bill designed to help labor should not be so worded that it puts another burden on the agriculture of this country." (Emphasis supplied). 83 Cong. Rec. 7401. . . .

"Mr. Thompson of Illinois. May I ask the gentleman from Iowa whether his amendment would apply to a packing house located in Iowa and Illinois in the area of production, which employs 200 or 300 men?

"Mr. Biermann. Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the state of Iowa that this amendment would apply to perhaps; but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town." 83 Cong. Rec. 7401.

"Mr. Biermann. I want to read a couple of sentences from a letter I received this morning from Edward A. O'Neal, president of the Farm Bureau Federation, in which he sets out the desirability of writing into this bill definitions such as proposed in my amendment. He states: 'We believe the bill should be clarified so as to assure the exemption of employees in such agriculture and horticulture industries in rural areas.' That is all my amendment takes in. He states further, as follows: 'Failure to exempt these operations when performed in rural areas where conditions are so greatly different from the situation in large industrial and urban centers, will result in increased costs of processing and handling these products which will be reflected back in

lower prices paid to farmers." 83 Cong. Rec. 7402.

"Mr. Reilly. Does the gentleman's amendment cover a pea-canning set-up that is situated away from the farm on which the peas are grown?

"Mr. Biermann. In a little town?

"Mr. Reilly. In a little town; yes.

"Mr. Biermann. But in the farm area?

"Mr. Reilly. Yes.

"Mr. Biermann. Yes; it does." 83 Cong. Rec. 7402. . . .

"Mr. Gilchrist. The amendment provides that out in the open country, where the handling, packing, or storing of agricultural commodities is done, there shall be certain exemptions from the provisions of the bill. We should have such exemptions so as to apply them to our creameries and milk producers and cheese makers. Do not destroy these farm activities. There is no question of health involved in what is done out in the open country, because the conditions there are healthful. The tempo of work out there is slower than in the cities." 83 Cong. Rec. 7405.[1]

[1] See also statements by Congressman Cooley subsequent to the adoption of the Biermann amendment by the House, showing that such amendment applied to tobacco handling in preparation for market as much as to the handling of any other agricultural commodity. 83 Cong. Rec. 7428.